

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

LYNN MAUS)	
Claimant)	
VS.)	
)	Docket No. 194,232
MESLER ROOFING)	
Respondent)	
AND)	
)	
INSURANCE COMPANY OF NORTH AMERICA)	
Insurance Carrier)	
AND)	
)	
KANSAS WORKERS COMPENSATION FUND)	

ORDER

Respondent appealed the October 31, 1997, Award entered by Administrative Law Judge Floyd V. Palmer.

APPEARANCES

The claimant did not appear, having previously settled his claim against the respondent on October 3, 1994. The respondent and its insurance carrier appeared by their attorney, Michael W. Downing of Kansas City, Missouri. The Kansas Workers Compensation Fund appeared by its attorney, Bruce D. Mayfield, of Overland Park, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The Appeals Board considered the record and adopted stipulations listed in the Administrative Law Judge's Award.

ISSUES

Fund liability is the only issue before the Appeals Board for review.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the briefs of the parties, the Appeals Board finds as follows:

Claimant fractured his right heel on January 20, 1992, when he fell while he was working for the respondent. Respondent provided claimant with medical treatment for the fractured heel and finally referred claimant to orthopedic surgeon Roger W. Hood, M.D., in Overland Park, Kansas. Dr. Hood first saw claimant on October 26, 1992. Dr. Hood recommended fusion of the subtalar joint for further treatment of claimant's heel fracture. Dr. Hood also found claimant was draining infection from his right tibia or shin bone. Dr. Hood diagnosed osteomyelitis that had been dormant for over forty years. Claimant had suffered a compound fracture of the right tibia when he was seven years old. The compound fracture at that time was treated with internal fixation composed of wire. However, until this episode, claimant had no problems with the right tibia.

Dr. Hood operated on claimant's right tibia on November 19, 1992, and removed the internal fixation wire from the old injury. Claimant was treated with antibiotics for the infection.

Claimant's medical treatment for his fractured heel was further complicated by a fall not related to his work in December of 1992 that fractured the right tibia at the site of the old injury. Dr. Hood was finally able to treat the injured heel by surgery and fused the subtalar joint.

The claimant settled his workers compensation claim for the right heel injury with the respondent on October 3, 1994, before Special Administrative Law Judge Ernest L. Johnson in Kansas City, Kansas. All issues, including the reasonableness of the settlement, were reserved between the respondent and the Fund for future determination.

Respondent contends at least a portion of the liability for this claim should be shifted to the Fund. Respondent argues it has satisfied the statutory requirements of K.S.A. 1991 Supp. 44-567(b) by proving it had knowledge of claimant's preexisting broken leg, because of the broken leg claimant suffered a permanent functional impairment, and the impairment resulted in claimant being a handicapped employee.

The Administrative Law Judge concluded that the respondent failed to prove Fund liability. The Appeals Board agrees with that conclusion. Respondent's owner, Scott Mesler, testified he knew claimant had fractured his right lower leg when he was a child. However, Mr. Mesler testified this preexisting injury had not prevented claimant from satisfactorily performing his job duties. Dr. Hood testified that, at the time of claimant's January 20, 1992, accident, claimant had no permanent impairment as a result of his previous right tibia fracture. Furthermore, the doctor testified, before claimant's January 20, 1992, fall, claimant was asymptomatic and because the osteomyelitis was dormant, claimant did not suffer from an abnormal condition.

The Appeals Board finds the Administrative Law Judge's Award contains accurate findings of fact and conclusions of law. The Appeals Board concludes there is no reason to restate those findings and conclusions in this Order. Therefore, those findings and conclusions are adopted by the Appeals Board as its own.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Floyd V. Palmer, dated October 31, 1997, should be, and is hereby, affirmed in all respects.

The Appeals Board approves and adopts all remaining orders contained in the Award.

IT IS SO ORDERED.

Dated this ____ day of February 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Michael W. Downing, Kansas City, MO
Bruce D. Mayfield, Overland Park, KS
Floyd V. Palmer, Administrative Law Judge
Philip S. Harness, Director